

Regulatory/Contractual Update

April 28, 2008

Volume 13, Issue 5

- On April 22, 2008, FAC 2005-25 was issued and is effective on April 22, except as noted:
 - **“Representations and Certifications - Tax Delinquencies”** (FAR Case 2006-011). This final rule, effective May 22, 2008, amends the FAR to add conditions regarding refusal to pay delinquent Federal taxes to standards of contractor responsibility, causes for suspension and debarment, and the certifications regarding debarment, suspension, and proposed debarment.
 - **“Electronic Subcontracting Reporting System (eSRS)”** (FAR Case 2005-040) (Interim). This interim rule amends the FAR to require that small business subcontract reports be submitted using the Electronic Subcontracting Reporting System (eSRS), rather than Standard Form 294 - and Standard Form 295.
 - **“Revisions to the Defense Priorities and Allocations System” (DPAS)** (FAR Case 2006-033). This final rule amends the language in the FAR to reflect the President's delegation of the Defense Production Act's priorities and allocations authorities in Executive Order 12919, and the current provisions of the DPAS regulations of the Department of Commerce in 15 CFR Part 700.
 - **“Use of Products Containing Recovered Materials in Service and Construction Contracts”** (FAR Case 2005-039). This final rule amends the FAR to clarify language regarding the use of products containing recovered materials, pursuant to the Resource Conservation and Recovery Act of 1976, and Executive Order 13101 “Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.” The rule also prescribes a new clause for use in service or construction contracts, to ensure that contractors deliver and make maximum use of products containing recovered material.
 - **“Enhanced Access for Small Business”** (FAR Case 2006-031). This final rule, effective May 22, 2008, creates a different, higher dollar ceiling enabling small businesses to use the small claims procedure for appealing a contracting officer's final decision. Section 857 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) changed the ceiling under the Contract Disputes Act from \$50,000 or less to \$150,000 or less for small businesses. The ceiling remains at \$50,000 or less for other types of businesses.
 - **“Federal Procurement Data System Reporting”** (FAR Case 2004-038) (Interim). This interim rule amends FAR Subpart 4.6 to revise the process for reporting contract actions to the Federal Procurement Data System.

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Items summarized in these Updates are for general informational/discussion/educational purposes only and should not be relied upon in the course of representation or in the forming of decisions in legal matters— independent counsel should be obtained.

- April 23, 2008, the Federal Register noticed the issuance of several final/proposed DoD rules:
 - Final rule to update requirements for DoD contractors to establish and maintain earned value management systems. The rule also eliminates requirements for DoD contractors to submit cost/schedule status reports.
 - Final rule to implement Section 823 of the National Defense Authorization Act for Fiscal Year 2008. Section 823 provides a 5-year extension to 2013 of the authority for DoD to carry out a pilot program for transition to follow-on contracting after use of other transaction authority.
 - Proposed rule “to amend the DFARS to address review and documentation requirements with regard to the use of time-and-materials contracts for the acquisition of non-commercial services. The proposed rule provides for the same level of review for both commercial and non-commercial DoD time-and-materials contracts.” Comments are due on/before June 23, 2008. See earlier Updates on other T&M developments.
 - Proposed rule “to amend the DFARS to revise the criteria under which the contract administration office may permit a contractor to release supplies for shipment without Government authorization of the shipping documents. The proposed changes will enable the Government to provide for the appropriate level of contract quality assurance at source, based on product complexity and criticality and the contractor's record of quality control.” Comments are due on/before June 23, 2008.
 - Final rule to remove text addressing an obsolete restriction on the acquisition of vessel propellers from foreign sources.

- On April 8, 2008, the Federal Register noticed the issuance of a proposed rule “to amend the FAR to implement recommendations to improve the regulations at FAR 32.001, 32.5, and 52.232-16 related to requests for progress payments and the Standard Form (SF) 1443, Contractor's Request for Progress Payments form used to request those progress payments.” Comments are due on/before June 9, 2008.

- On April 2, 2008, the Federal Register noticed the issuance of a proposed rule to “to amend the FAR to revise the contractor performance information process. The FAR revisions include changes to FAR Parts 2, 9, 13, 17, 36, 42, and 53.” Comments are due on/before June 2, 2008.

- On March 31, 2008, the Federal Register noticed a final DFARS rule on “Contractor Personnel Authorized to Accompany U.S. Armed Forces (DFARS Case 2005-D013).”

- On April 21, 2008, the Federal Register noticed the issuance of a request for input whereby “DoD is interested in creating new and/or expanding existing pathways for nontraditional contractor participation in defense procurements.” Specific information is requested from the public including the definitions of “nontraditional” contractor, etc. Comments are due on/before June 20, 2008.

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- April 26, 2008, the Federal Register noticed the issuance of two FAR Advance notices of proposed rulemaking. “The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are interested in determining if, when, and how service contractor employees' personal conflicts of interest (PCI) need to be addressed and whether greater disclosure of contractor practices, specific prohibitions, or reliance on specified principles would be most effective and efficient in promoting ethical behavior.” The other notice concerned a similar topic but from the perspective of organizational conflicts of interest (OCIs). Comments are due on/before May 27, 2008.
- DoD continues to issue memoranda including the following:
 - **“Approving Payments under Cost-Reimbursement, Time-and-Materials, and Labor-Hour Contracts.”** On April 14, 2008, Shay Assad, the DoD Director of Defense Procurement, Acquisition Policy, and Strategic Sourcing, issued a memorandum “to reiterate the policy on approving payments” under such contracts. The DCAA has sole authority for verifying claimed costs and the ACO has approval authority over final payment requests.
 - **“Revision on DoD-Wide Prohibition to Order, Purchase, or Otherwise Procure Property or Services in an Amount in Excess of \$100,000 through the GovWorks Federal Acquisition Center.”** On March 28, 2008, the DoD Director of Defense Procurement issued subject memorandum to “advise the Military Department and Defense Agencies on the rescinding of current restrictions on DoD's use of GovWorks (now known as AQD-Herndon, Virginia) for procurements in excess of \$100,000, and the imposing of new restrictions specifically related to acquisition of furniture....”
 - **“Small Business Size Representation” - FAR Case 2006-032.** On March 25, 2008, the DoD Director of Defense Procurement issued subject memorandum which “updates direction provided in the July 18, 2007 memorandum advising Military Departments and Defense Agencies not to take the action required by FAR 4.602(f) until further notice. Effective immediately, agencies should follow the” the guidance in the attachment thereto for Reporting Representation Actions in FPDS (Federal Procurement Data System).
 - **“Update on DoD's Implementation of the Electronic Subcontracting Reporting System (eSRS).”** On April 14, 2008, a DoD memorandum was issued.
- The American Bar Association Public Contract Section has published its Guide to Service Subcontract Terms and Conditions. The Guide is intended “to help Government prime contractors and subcontractors select mandatory and advisable flow-down clauses for subcontracts, along with suggested representations and certifications, commercial item contract clauses, and intellectual property clauses.” The book is available at www.ababooks.org.

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- On February 22, 2008, the US Office of the Director of National Intelligence issued its “Information Sharing Strategy” reflecting “the country's intelligence community move to a ‘need to share’ culture.” The publication with its information sharing strategy and implementation is available at http://www.dni.gov/reports/IC_Information_Sharing_Strategy.pdf
- On April 15, 2008, OMB issued a memorandum on “Preventing Waste, Fraud, and Abuse in Use of Government Credit Cards.”

Comments on items that may be of potential interest in contract negotiation and contract drafting/management—

- Many times in the creation of a teaming arrangement, development agreement, etc. some think that a fiduciary relationship may have been created. The consequences of such a result could, in addition to contractual obligations, potential contract damages, etc., have a finding that tort liability may have been produced with the consequent risk of punitive damages being awarded for violations. In the recent California Supreme Court decision (which the court described as a “complex case” and where the collaboration of the parties “resulted in extraordinary scientific and commercial success”) of City of Hope National Medical Center v. Genentech, Inc., (April 24, 2008, No. S129463) there is an exhaustive opinion by the court of the various legal as well as factual bases on whether or not a fiduciary relationship exists.

Specifically, where in this case “City of Hope in return for royalties, entrusted a secret scientific discovery to Genentech to develop, to patent, and commercially exploit,” the court looked at several aspects including the following:

- Contractual language expressly stating the non-existence of an agency, joint venture or partnership relationship.
- Contract stated the parties were to be independent contractors.
- The Contract was not entered into with the view that Genentech “was acting primarily for the benefit of the City of Hope.”
- The contract provided that it “envisions a mutually beneficial relationship” between the parties.
- A “fiduciary relationship is not necessarily created simply when one party, in exchange for royalty payments, entrusts a secret invention to another party to develop, patent, and market the product.”
- Both parties were represented by counsel.
- One party’s “ability to exploit a disparity in bargaining power” does not necessarily create a fiduciary relationship.

The court found that a fiduciary relationship did not exist but did affirm the award of significant contractual damages. The case is available at <http://www.metnews.com/sos.cgi?0408%2FS129463>

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- The Fifth Circuit Court of Appeal on April 2, 2008, issued a decision in The Rice Co. (Suisse), S.A. v. Precious Flowers Ltd. et al, No. 07-20063, where a rice shipper brought an action to compel arbitration of damages allegedly sustained to the rice that it planned to have shipped from Lake Charles, Louisiana to Togo. All of the rice was not loaded when the vessel had to leave port early due to an impending Hurricane and was then docked in Houston where damage to the rice was asserted to have been caused “due to unseaworthy hatch covers.” A Bill of Lading had not been issued. The owner of the vessel had earlier chartered the vessel to another entity, “IBN,” under terms that included London arbitration. The rice company had contracted with IBN to ship the rice and that contract included arbitration in New York.

In an action brought by the rice shipper against defendants the court denied a motion to compel arbitration in New York was affirmed by the Fifth Circuit due in part “where 1) the parties to instruments at issue unambiguously structured their relationship such that the vessel owner was not a party to the voyage charter containing the (New York) arbitration clause; and 2) the district court did not err in holding that the bill of lading did not bind the vessel owner to the voyage charter's mandatory arbitration clause.”

The time chartered agreement required IBN to ship goods on same but “without prejudice to the owner.” Accordingly, the ship owner, even after the issuance of a Bill of Lading by IBN to the rice owner,” could not be found then to have been, as a nonsignatory, committed to arbitration in New York, i.e. IBN could not obligate, as an agent, through the Bill of Lading, arbitration in New York—which to do so would have been in contravention of the original time charter agreement of “prejudice” to the owner!

Consequently, there will not be one consolidated arbitration—but as the court stated while quoting an earlier decision by the same court, “duplication of effort, redundant testimony, and the possibility of inconsistent findings...are the risks that parties to an arbitration clause must have considered to have contemplated at the time they struck their bargain.”

Accordingly, this court decision suggests that the terms of any owner/agent agreement must be reviewed since, as here, it may impact, among other things, the forum for dispute resolution or other terms of shipment. The case is available at <http://caselaw.lp.findlaw.com/data2/circs/5th/0720063cv0p.pdf>

- A new online Bid-Rigging Prevention Tool prepared by the Canadian Competition Bureau is available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02647e.html>. The Tool presents government/commercial examples, recommended actions, etc.
- Yasar Ozturk (y.ozturk@ozturklawoffice.com) has made available his excellent pamphlet on “Aircraft Leasing In Turkey.” Other publications are also available at his website www.ozturklawoffice.com.

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Future Speaking Topics Include—

- “Contract Negotiation” seminar as part of the Acquisition Solutions, Inc. Performance-Based Acquisition Master’s Certificate Program—“one-of-a-kind Master’s Certificate Program in performance based acquisition facilitates...command of the knowledge, tools, and techniques needed to plan, negotiate, and manage contracts and programs using the performance-based approach.” Seminars are offered nation-wide. Scheduling/registration information is at http://www.acqsolinc.com/asi_training-institute.cfm.
- NCMA Educational Conference, Antelope Valley Chapter and Sacramento/Gold Rush NCMA Chapter, "Contract Negotiations."
- "Solicitations, Bids, Proposals and Source Selection: Building a Winning Contract," NCMA NES, Puget Sound and Central Connecticut Chapters.

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